IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 29-04-2009

CORAM:

THE HONOURABLE MRS. JUSTICE PRABHA SRIDEVAN
AND
THE HONOURABLE MR. JUSTICE T.S. SIVAGNANAM

CMA.No.3238 of 2003
& C.M.P.No.20859 of 2003
P.K. Bhanu (deceased)

1. Ricardo Seagal
2. Patrick Bhanu
3. Robin Michael Bhanu

(Petitioners 2 and 3 represented by
their power agent Ricardo Seagal) ... Petitioners

(appellants 2 to 4 brought on record as legal representatives of the deceased sole appellant vide order of Court dated 17-11-2008 made in C.M.P.no.20240 of 2005.)

Versus

Additional Directorate
Enforcement Directorate
New Delhi ... Respondent

For appellant :: Mr. V.K. Sathyamurthy
For respondent :: Mr. M. Dhandapani, SCGSC

JUDGMENT
Heard Mr.V.K.Sathiamurthy, Learned Counsel for the Appellant and Mr.Dhandapani, Learned Standing Counsel for the Respondent. The above appeal had been filed by one P.K.Bhanu (since deceased) challenging the order passed by the Appellate Tribunal for Foreign Exchange, New Delhi in appeal No. 321 of 1982 dated 4.9.2001, confirming the order dated 12.11.1982 passed by the Respondent herein, the adjudicating authority.

2. The question of law which has been framed for consideration in the above appeal is as follows. "Whether the appellate Tribunal is right in relying on the confessional statement of the appellant dated 02.03.1981, which was retracted by him, in his letter dated 06.03.1981 sent from the Central Prison, Madras, which is inadmissible in law and cannot be used against him for any purpose in view

of the retraction at the earliest point of time?"

3. For the purpose of the answering the question of law framed, it is necessary to consider the facts of the case and the relevant facts are stated as hereunder:
Shri.P.K.Bhanu the Appellant was issued a show cause notice dated 6.7.1981 by the Respondent herein calling upon him to show cause as to why adjudication proceedings as contemplated in section 51 of the Foreign Exchange Regulation Act, 1973, hereinafter referred to FERA, should not be held against him for acquiring foreign exchange from person other than an authorized dealer without the permission of the Reserve Bank of India which is in contravention of Section 8 (1) of FERA, and as to why the foreign currency of US$40,000/- seized from the Appellant on 2.3.1981 should be confiscated to the Central Government under Section 63 of the Act.
4. The show cause notice stated that, reliance is placed on the following statements and documents.

a.Statements of Shri.P.K.Bhanu, L.A.Verma and K.V.Chandran on 3.2.1981 and 3.3.1981.
b.Statements of Shri.Subramanian given on 2.3.1981.
c.Statement of Shri.S.Hassan Bai given on 22.5.1981
d.Documents seized from:
i. the hotel room at Queens Hotel, Madras, occupied by
Shri.P.K.Bhanu 2.3.1981.
ii. the person and his residential premises of Shri.L.A.Varma on 2.3.1981.
iii.the person of Shri.K.V.Chandran on 2.3.1981.
iv.the residential premises of Shri.S.Hassan on 22.6.1981.

5. The Appellant was permitted inspection of the documents relied upon by the Department, by himself, his Lawyer or authorized representative from the office of the Respondent Department. The attention of the Appellant was invited to the provisio of Rule 3 to the Adjudication Proceedings and Appeal Rule, 1974 as regards the further procedure to be followed.

6. A reply dated 19.8.1981 was submitted by the appellant through his counsel emphatically denying the allegations in the show cause notice. It was stated in the reply that P.K.Bhanu brought 80,000 US$ from Saudi Arabia on 17.1.1981 when he landed at Bombay Airport and that the same has been endorsed in his passport and a Currency Declaration Form was issued to him signed by the Customs Officer at the Airport. It was further stated when P.K.Bhanu was in Queens Hotel on 2.3.1981 he was carrying with him 40,000US$ out of 80,000US$ brought by him. It was further stated that the officers also removed the passport, original CDF Form and records as detailed in the Mahazar. It was further stated that Mr.P.K.Bhanu was forced, threatened, unduly harassed to write a statement to the dictation of the officer which was not voluntarily given and that this statement was retracted by the Appellant while he was in Central Jail, by his letter dated 6.3.1981 addressed to the Deputy Director of Enforcement despatched on 7.3.1981. It was further stated P.K.Bhanu does not know anything about Hassan Bai, Subramanian, Verma and Chandran nor about their alleged statement.

7. The Adjudicating Authority commenced adjudication and statements of K.B.Chandran, L.A.Verma, Hassan Ibrahim, Mr.B.Kistoor Chand, (Assistant Enforcement Officer) Mr.A.Kalyanasundaram, (Assistant Director (Documents), Tamil Nadu Forensic Science Lab, Mr.P.Avinashi, Welfare Officer, Central Prison, Vellore, were recorded in the presence of the Counsel for P.K.Bhanu and they were all cross examined by the Counsel.

8. The Adjudicating Authority by an order dated 12.11.1982 held that Mr.P.K.Bhanu has not been able to discharge his onus that the Foreign Currency of US $ 40,000 found in possession on 2.3.1981 was acquired by him and was lawfully brought by him from abroad. The Adjudicating Authority held that the statement dated 2.3.1981 given by P.K.Bhanu stating that he had acquired Foreign

Exchange from Hassan and others in India cannot be ignored, as it is supported by the statements of L.A.Verma and Hassan and also the notings in the documents seized from L.A.Verma and P.K.Banu. The Adjudicating Authority held that P.K.Bhanu had contravened to the Provisions of Section 8 (1) of FERA and proceeded to impose a penalty of Rs.3,00,000/- on P.K.Bhanu under Section 50 of FERA. The US $ 40,000/- was directed to be confiscated under Section 63 of FERA. In respect of the alleged violation of Section 9 (1) (d) of the Act, the Adjudicating Authority found that the evidence available was inadequate to find P.K.Bhanu guilty of contravention of Section 9 (1) (d) and dropped said the charge.

9. The Appellant being aggrieved by the order of the Adjudicating Authority filed an Appeal under Section 52 of FERA to the Appellate Board. In the Memorandum of appeal, it was stated that that the alleged confession recorded on 2.3.1981, retracted by letter dated 6.3.1981 from the Central Jail, is inadmissible. It was further stated that P.K.Bhanu had brought US $ 80,000/-into India after declaring them to the Customs and obtaining Customs Declaration Form and US $ 40,000 which was seized is only part of the same. In ground 8 of the Memorandum of Grounds it is averred that the Adjudicating Authority without any basis accepted the contention of the Department that the appellant would have taken back to Singapore the foreign exchange which he legally brought to India without any proof as to the same and that the Department did not make any investigation into this aspect of the case though they had all the possible means to do, the obvious reason being that the records of the Customs Department will show that the appellant did not carry any Foreign Currency with him and that would on the face of it falsify the confession.

10. Before the Appellate Tribunal strong reliance was placed on the retraction of the statement recorded by the officers and it was urged that if these retracted statements are taken into consideration, there is no evidence against the Appellant. It was further contended that the burden of proof is on the department and even if onus can be said to have shifted to the Appellant under Section 71 (3) of FERA, the same has been sufficiently discharged by the Appellant by producing the Currency Declaration Form. On behalf of the Department it was contended by the Learned Standing Counsel that the provisions of the Evidence Act are not applicable to the Adjudicating proceedings as they are governed by the Adjudication Proceedings and Appeal Rules, 1974. It was further contended that the burden of proof that P.K.Bhanu came into possession of the seized currency in a lawful manner is on him interms of Section 71 (3) of FERA, which has not been discharged by the Appellant. It was further contended that even a retracted statement can be admitted in evidence if it is found to be true and voluntarily made. On facts it was held that though the appellant had furnished Currency Declaration Form showing that he had brought US $ 80,000/- but he went back to Singapore before coming again to India. When he was apprehended, in his statement, the appellant stated that he took back the US$ to Singapore. In response to the Appellant□s submission during the adjudication proceedings that he encashed US$40,000/- out of 80,000/- and the seized 40,000/- are balance of the US $ 80,000/- which he brought in India as per the currency declaration form, the adjudicating authority asked the appellant□s counsel to produce evidence of the encashment of US$40,000/- as claimed by the Appellant. Inspite of opportunities, the appellant did not produce the requisite evidence of encashment of US$40,000/- by the appellant as claimed by him.

11. The Appellant Tribunal after considering the various issues raised, by an order dated 4.9.2001 dismissed the Appeal holding that the Appellant failed to discharge his onus under Section 71 (3) of FERA. It is against this order the above appeal has been preferred by Mr.P.K.Bhanu. During the pendency of the appeal, P.K.Bhanu died and his legal representatives have been brought on record vide order of this Court dated 17.11.2008 made in CMP.No.20240 of 2008.

12. The Learned Counsel appearing for the Appellant strenuously contended that the impugned

orders suffers from manifest error and that the Tribunal lost sight of vital facts and the order is liable to be setaside. Principally the Learned Counsel for the appellant submitted that the alleged confessional statement dated 3.2.1981 cannot be relied upon as the same has been retracted by letter dated 6.3.1981 sent from the Central Prison. It was further contended that there is no corroboration of the statements recorded and unless a retracted confiscation is corroborated in material particulars the appellant cannot be held guilty. The Learned Counsel took us through the statements recorded from various persons, the Mazahar the copy of the Currency Declaration Form and other documents filed in the typed set of papers and contended that the passport of Mr.P.K.Bhanu was with the department and they could have verified the contentions raised and the Department could have initiated investigation against the 22 persons who are said to have paid money. The Learned Counsel took strong objection to the finding by the Adjudicating Authority as well as the Appellate Tribunal regarding the question posed to the Learned Counsel as to whether any records can be produced regarding the encashment of the US$ 40,000/-. It was further contended by the Learned Counsel for the Appellant that the retraction was forwarded from the Central Jail and there is presumption that it should have been handed over to the Respondent Department.

13. The Learned Counsel for the Appellant placed reliance upon the following Judgments as regards the evidentiary value of the retracted confession.

1. Puran Vs. The State of Punjab (AIR 1953 S.C. 459 (Vol. 40, C.N. 111))
2.Muthuswami Vs. State of Madras (AIR 1954 S.C. 4 (Vol. 41, C.N.2))
3.Pangambam Kalanjoy Singh, Appellant vs. State of Manipur
(AIR 1956 S.C. 9 (V. 43 C.3 Jan.))

4.Sevantilal Karsondas Modi Vs. The State of Maharashtra
and another(AIR 1979 Supreme Court 705)

5.Abdulla Mohammed Pagarkar vs. Abdulla
((1980) 3 Supreme Court Cases 10)
6.Kora Ghasi vs. State of Orissa((1983) 2 Supreme Court Cases 251)

The Learned Counsel also relied on AIR 1958 Punjab page 440, stating that the effect sending a letter to the post office will in general be regarded as presumptively proved.

14. The Learned Standing Counsel appearing for the Respondent contended that there arises no question of law in the above appeal and as such the appeals is not maintainable under Section 54 of the Act. The Learned Standing Counsel submitted that FERA is a self contained code and the provisions of the Evidence Act has no application to the statements made before the officers and that the confessional statements under Section 40 of FERA can be used for proceedings under the Act. The Learned Standing Counsel for the Respondent further submitted that the Adjudicating proceedings are covered by Adjudicating Proceedings and Appeals Rules, 1974 and the Adjudication in the present case was conducted strictly in accordance with the 1974 Rules. The Learned Counsel for the Respondent relied upon the following Judgments in support of the contentions raised by him.

1.2001 CRI. L.J. 1132
(J.Ibrahim vs. Special Director, Enforcement Directorate, New Delhi).

2.2001 (4) CTC 609
(M/s.Arcot Exports, Amir Mahal, Madras Vs. The Director of Enforcement, Enforcement Directorate, New Delhi)

3.CFC (Ker.) 50
(P.S.Barkathali Vs. Director of Enforcement, New Delhi)

4.CFC (Mad) 301
(Deputy Director, Enforcement Directorate vs.
P. Mansoor Mohamed Ali Jinnah)

15. We have carefully considered the submissions made on either side and have gone through the records and documents placed before us. As mentioned above a question of law has been framed by order dated 19.01.2004, when the appeal was admitted. Undoubtedly the question regarding the evidentiary value of a statement recorded by an officer under Section 40 of FERA and the question whether the retracted confessional statement requires corroboration from any other independent evidence are questions of law to be considered in this appeal. Therefore we reject the first contention raised by the Respondent that there is no question of law in the above appeal. Having held so, we proceed to answer the question framed for which certain basis facts are required to be reiterated.

16. What we have to decide is whether under Section 8(1) of the Foreign Exchange Regulation Act restrictions are imposed on dealing in foreign exchange, and no person other than an authorized dealer shall purchase, acquire, borrow from, or sell, transfer otherwise lend or exchange any foreign exchange except with a previous general or special permission of the Reserve Bank. Therefore, it is the possession of the foreign exchange to the extent of 40,000/- dollars that is alleged to be the contravention of the provisions of the Act. The case of the appellant is that the production of the currency declaration form would prove that he had brought it from Saudi Arabia through proper channel and once the currency declaration form is produced and his right to possess 80,000 US$ is proved then it is for the Department to show that he had taken away this 80,000US$ to Singapore and that this 40,000 US $ does not form part of the 80,000US$ shown in the currency declaration form. P.W.2 is one K.V. Chandran. According to him, the statement recorded on 02-03-1981 by the officers of the Department was actually written by him on dictation. He was taken to the office and kept there till 4.00p.m. on the next day viz., 03-03-1981. He was not allowed to go anywhere. During this time only one statement was recorded and that was on the third morning. He had written a letter subsequently retracting the statement recorded on 03-03-1981 as forced statement. When he was cross-examined, he has stated that he did not remember whether a statement was also recorded from him. On 03-03-1981, according to him except the personal details regarding his name, nationality, profession other details are false. According to him, amongst the documents seized, there were some documents mentioning 80,000US$. It was an airport form and he did not exactly remember what it was. This witness is re-examined by the Department. He had stated that P.K. Bhanu is his uncle and he had entered the room at the Queens. hotel and the Directorate Officer is conducting the search. According to him, except the letter of authority given by Mr. P.K. Bhanu for recruitment of persons for job outside India. He has no other business connection with the appellant. He was also searched. Some documents were recovered from him. He signed the mahazar because he was asked to sign. The search and seizure ended in 13 hours on 02-03-1991. Thereafter, he was brought to the Directorate. According to him, the writing of the statement started in the early hours of 03-03-1981. He has denied that he was left free at 5:00p.m.on 02-03-1991.

17. The next person whose statement was recorded was L.A.Verma. He has also stated that except for the details about himself, name, address etc., the other factors are not true. He denied that he knows Hassan Bai or any Subramaniam. According to him, everything was recorded as per dictation of the officers. His statement is almost similar to that of K.V. Chandran. He has admitted that the photo copy of the letter dated 10-07-1979 from Bhanu Corporation to ELCEE Commercial Corporation was given to him by K.V. Chandran with a request to him to find persons for jobs

outside India. He has stated that afterwards nothing had happened.

18. Next person whose statement was recorded was Hassan Ibrahim. He has denied that he has given any statement in the name of Subramaniam. According to him he has stated that he was threatened and therefore, he has given the statement. He has stated that he had given a statement in the name of Subramaniam because he was asked to do so. His passport was shown to him and he had admitted the entries regarding his visit to Singapore and Burma. He had not complained to the Magistrate about ill-treatment by the officers. The sheets 4 to 8 and 13 and 14 were admitted as having been seized from his residence but according to him it did not relate to his business transaction.

19. Mr. Kistoorchand was examined next. He had participated in the search. He is the Assistant Enforcement Officer. Mr. A. Kalyana Sundaram, the Assistant Director (Documents), Tamil Nadu Forensic Science Laboratory, Madras 4 had stated that the handwriting of the statement allegedly made by Subramaniam in the writing made by one Hassan was sent to him for comparison and the opinion given is both are similar.

20. Then P. Avanashi, Welfare Officer, Central Prison, Vellore was examined. He has spoken to the fact that on 06-03-1981, the prisoner P.K. Bhanu gave him a letter addressed to the Deputy Director, Enforcement Directorate, Madras. It had been recorded in the "Register of petitions received and disposed of from the prisoners." According to him the letter of P.K. Bhanu was a hand written one. Jeevarathinam, the Chief Enforcement Officer had stated that P.K. Bhanu, L.A. Verma and K.V. Chandran were taken to the Officer of the Enforcement Directorate, Madras and all the statement were given by them voluntarily. In his cross-examination he was shown the customs declaration form and he has admitted that it is a genuine and valid declaration. He was asked whether P.K. Bhanu told him that it was part of the 80000US$ brought inside India. The answer was he did not tell him that 40,000US$ recovered from his brief case form part of the 80000US$ brought from India under the declaration form. According to him, he did not arrest P.K. Bhanu on 02-03-1981. He was asked as to whether he verified from any of the persons in whose names the passports found in Ex-P3 file stand and whether any of them gave money to P.K. Bhanu. He has admitted that he had not done so because he did not have the address. He has stated that the accused did not send the petition on 06-03-1981 in which he had retracted the statement on 02-03-1981. According to him no such petition was received from the accused through jail. He had stated that the declaration form had to be produced if he wanted to take the foreign currency covered in the declaration form outside India. Then a question is asked as, "Did you check up with the Airport Customs authorities whether the accused when leaving India on 13-02-1981 produced this currency declaration form?". This question is asked in the cross-examination. He has denied that the 40,000 US$ form part of 80,000US$ that were seized.

21. Avanashi was also examined before the Additional Chief Metropolitan Magistrate, Egmore. He again represented that P.K.Bhanu gave a letter in which he had retracted the statement. In the statement made on 02-03-1981 which was subsequently retracted, P.K.Bhanu had said that he was recruiting persons from India for employment for a contract in Jeddah. He had referred to the seizure of 40,000US$. He has also referred to the seizure of the currency declaration form. He had stated that this sum of 80,000US$ was also taken by him when he leave for Singapore. This statement also refer to the manner in which he allegedly collected the 40,000US$. This was affirmed on 03-08-1981 but this was retracted. Under the mahazar in addition to the cheque books, the pass books etc., which were seized, they also found a purse in the pocket containing 40US$ and 195 Singapore Dollars, one pocket diary Ex-P4 and one file containing 190 sheets which included photostat copies of passports standing in the names of various persons from the brief case of the accused, Ex-P3 file. These were the documents in the evidence produced before the Tribunal.

22. Now we will refer to the various decisions referred before us.
(i) In M/s. Chuni lal Dwarka Nath Vs. Hartford Fire Insurance Co. Ltd., (AIR 1958 Punjab 440) it is held thus:
"Section 16, Illustration (a) and S.114 Illustration (f) apply to the course of business followed in public offices as well as in private offices. The effect of sending a letter to the post office will, in general, be regarded as presumptively proved, if the letter be shown to have been handed to or left with the person whose duty it was in the ordinary course of business to carry it to the post office." This was relied on to show that the retraction letter should have been delivered.
(ii) In Puran Vs. State of Punjab (AIR 1953 SC 459) it was held that the a retracted confession cannot form the base for the conviction unless it is corroborated in material particulars.
(iii) In Muthuswami Vs. State of Madras (AIR 1954 SC 4) it is stated that a confession should not be accepted merely because it contains a wealth of detail which could not have been invented. Unless the main features of the story are shown to be true, it is unsafe to regard mere wealth of uncorroborated detail as a safeguard of truth.
(iv) In Pangambam Kalanjoy Singh Vs. State of Manipur (AIR 1956 SC 9) it was held that, "even if a confession is inculpatory, corroboration is necessary if the confession is retracted."
(v) In Kora Ghasi Vs. State of Orissa (1983 (2) SCC 251 it was held that the retracted confession made before Magistrate, even if voluntary requires corroboration.
(vi) In Rattan Singh Vs. State of Punjab (1981 (4) SCC 481) it was held that the detention is illegal upon the failure of jail authorities to forward detenu's representation to Central Government either directly or through State Government and lying unattended for several months .
23. We have seen from the decisions cited above that even if a confession is inculpatory, corroboration is necessary if the confession is retracted. We will see if there is corroboration in this case. In Deputy Director, Enforcement Directorate Vs. P. Mansoor Mohamed Ali Jinnah (CFC (Mad) 301) a writ of mandamus was filed to forbear the officers of the Directorate from proceeding further under the Foreign Exchange Regulation Act(FERA). The writ petition was allowed. Against that an appeal was filed. The respondent's claim that they were forced and statements were obtained from them. It was held that confessional statement made under Section 40 of the FERA can be used for proceeding under the Act and the respondents are not "accused" persons. The officers of the FERA and Customs Act are not police officers and on facts in that case it was found that the confessional statements of the respondents were not got by any inducement, threat or promise and there the Division Bench suggested that "it would be better if the authorities under the Customs Act and FERA take the statements of the person in his own hands there may not be any complaints subsequently that the authorities have not recorded the statement properly." The statement of P.K. Bhanu recorded on 02-03-1981 was in his writing and it states in brief that he was recruiting persons in India for his contract in Jeddah, that the 40,000 US$ that was seized from him was received by him from persons in India during his present visit and that the officer had seized the currency declaration form made by him on 17-01-1981 for a sum of Rs.80,000US$. He also stated that this sum of 80,000 US$ was taken by him to Singapore on 13-02-1981 and he has stated that the sum of 40,000 US$ and 195 Singapore dollars were seized from his purse. Item 6 of the mahazar is a 1981 diary. It shows entries made on several dates from 01-01-1981 to 06-01-1981 which were for persons recruited in India on several dates and then again for February 1981, March 1981 and April 1981. Serial No.14 to 34 relates to correspondence etc of M/s. Albhanu & Co. in Singapore and Jeddah. Sheet No.3 is the currency declaration form which is already referred to above. So this was signed on 02-03-1981 and confirmed on 03-08-1981. This is the statement that is said to be retracted by him by the letter of retraction sent by him from jail. It is the case of the appellant that this retracted statement was given by him to Avanashi and we have already recorded the statement of Avanashi who has stated that he had indeed received a letter from the prisoner. This has not reached the Directorate.
24. We will assume that there was indeed a retraction. Even if the appellant had made a retraction, it is possible to rely on the retracted statement to convict him if there is corroboration. The retracted

statement merely says that a statement was signed by him under threat or force. All the documents referred to in the statement on 02-03-1981 have been seized from him on 02-03-1981 itself as seen from the Mahazar dated 02-03-1981. The retracted statement does not refer to the documents seized. Therefore, the documents seized from the appellant cannot lose their evidentiary value if there is no denial by the appellant regarding the genuineness of the documents. The statements dated 02-03-1981 is ofcourse inculpatory.

25. Next we will look at the evidence of K.V. Chandran. The witnesses K.V. Chandran, L.A. Verma, Hassan Ibrahim also have given their statements. They claim they have retracted them. But there is no evidence of their retraction. The retraction statements have not been received by the Directorate. In K.V. Chandran's statement, he has referred to the seizure of the currency declaration form. In his statement dated 02-03-1981, he had stated that the appellant had fixed 11,500 per candidate and that this amount should be paid in US$. In the appellant's retracted statement, he had stated that "Mr. Hassan Bai gave me foreign currency on 01-03-1981 morning at the rate of Rs.11500/- per person".

26. Next we take up the statement of L.A. Verma. He has also stated that this statement was retracted but that retraction was not received by the Directorate. In his statement dated 02-03-1981 had stated that K.V. Chandran his family friend had introduced the appellant. It is P.K. Bhanu who wanted to recruit candidates and that for recruitment of candidates that one should pay Rs.11500/- per person and that it should be paid to him in US$ and that one person (Bai) had paid the foreign currency to P.K. Bhanu at the rate of Rs.8.50p per US$. In the retracted statement of P.K. Bhanu he had stated that the exchange rate at which he received the US$ were at the rate of Rs.8.50p per US$. L.A. Verma had also said that twelve persons whose names are found in sheets 2 and 3 seized from him were given by the said Bai to him and apart from these twelve persons, 10 more persons were interviewed by the appellant P.K. Bhanu. We find corroboration for the retracted statement of P.K. Bhanu that Hassan Bai had given him US$ for 22 persons at the rate of Rs.8.50p per US$. It is also stated by L.A. Verma that Bai asked the appellant whether he can carry so much foreign currency. The appellant said that he can carry upto 80000 US$ on the basis of the currency declaration form in his possession. The statement of Hassan dated 22-06-1981 also indicates the rate at which the appellant collected money per person i.e., Rs.11500/- per person which amount had to be paid in US$ and also that there were 22 persons who were interviewed and that the amount had been given at the rate of 8.50 per US$. Evidence had been recorded to show that Subramaniam, whose statement was recorded on 02-03-1981, is none other than Hassan Ibrahim whose evidence was recorded on 22-06-1981. Even if we ignore Hassan Ibrahim's evidence and even if we accept the appellant had retracted the statement, the retracted statement is corroborated by all the documents seized from P.K. Bhanu on 02-03-1981 as well as the statements recorded from L.A. Verma and K.V. Chandran.

27. Now, L.A. Verma and K.V. Chandran also claimed that they had retracted the statement. But for this there is no evidence. Two questions were asked by the Additional Director, Enforcement Directorate of teh counsel who appeared for the appellant. One was whether it is possible to produce a copy of the petition dated 06-03-1981 which is the retraction statement and the other question, what happened to the balance of 40,000 US$ out of the 80,000US$ brought by P.K.Bhanu.

28. As regards the first question, this direction to produce was made because the retracted statement was not available in the office. We may even ignore the fact that the counsel was unable to produce the copy because the prisoner may not have taken a copy of his retraction. But the second question is a crucial one. The case of the appellant is that the 40,000US$ is the balance out of the 80,000US$. So he should be able to say how he disposed of the 40,000US$. The learned counsel for the appellant repeatedly urged that there is no presumption of guilt in proceedings under Section 40 and once the authorities had the currency declaration form, which was evidence of the fact that the appellant had brought in 80,000US$ then his possession of 40,000US$ is explained by the currency declaration form. It was contended that the appellant had a flourishing business in India, he had a theatre in Kerala and he need not explain where he sent the balance 40,000US$.

Further it was submitted by the learned counsel for the appellant that it is only in the retracted statement that we find that the appellant went to Singapore. If the statement is eschewed then the appellant's possession of 80,000US$ is explained by the customs declaration form. Further the learned counsel submitted that it is impossible to believe that the customs officers would have allowed the appellant to board the plane at Chennai to Singapore that the 80,000US$ in his pocket.
29. We do not think we can decide this matter by presuming how the customs officers would have behaved or by presuming that the appellant had stored the 40,000US$ anywhere in this country. Foreign exchange cannot be parted with so easily and that too a huge amount of 40,000US$. Purchase and sale of foreign exchange is subject to regulation and it can be done only by an authorised person. Therefore, the appellant was bound to explain what happened to the 40,000US$. It is true that the initial burden of proof was discharged by him by production of the currency declaration form. But the onus to prove a particular fact is not static, it is continuously shifting. When the Department had evidence to show that he had gone to Singapore then it is for him to explain how in spite of leaving India, he had the currency declaration form with him and what happened to the remaining 40,000US$. It is not open to the appellant to deny that he had gone to Singapore because in the retracted statement he had stated that the sum of 195 Singapore dollars were brought by him from Singapore and he had kept it as 'loose change' in his pocket. Further in cross-examination Jeevarathnam has stated as follows:
"Que: Did you check with the Airport Customs authorities whether the accused when leaving India on 13-02-1981 produced this currency declaration form?
Ans: I did not make any such verification because the persons are expected to only show the currency declaration form as proof of having brought foreign currency into India and not to surrender it."
So admittedly the appellant left India on 13-02-1981. If so it is for him to explain what he did with the 80,000US$ and more importantly the balance of 40,000US$. So the onus had shifted back to the appellant which has not been discharged. The facts as collected from the retracted statement and are corroborated by the statement of L.A. Verma and K.V. Chandran and also by the documentary evidence that he had collected from 22 persons at the rate of Rs.11500/- per person in the form of US dollars at the rate of Rs.8.50p per US$ stands proved. Therefore, even accepting the mistaken identity of Subramaniam and Hassan Ibrahim and also accepting that there was a retracted statement, the conviction of the appellant for contravention of FERA is proved by other materials and evidence. There is at least some evidence to show that the appellant handedover the retracted statement to Avanashi. But the retraction of K.V. Chandran and Verma was neither received by the Directorate nor did they have any copy of it. Hassan Ibrahim did not retract his statement but in the evidence, he denied having given any foreign exchange to P.K. Bhanu. The Tribunal was quite correct in therefore, coming to the conclusion that it is for the appellant to prove that he had lawfully come into possession of the foreign exchange. Section 71(3) of the FERA reads as follows:
"If any person is found or is proved to have been in possession of any foreign exchange exceeding in value fifteen thousand rupees, the burden of proving that the foreign exchange came into his possession lawfully shall be on him."
30. By the mere production of the currency declaration form, the appellant cannot claim that he had discharged the burden of proof. The entries in the books recovered from his possession clearly proved that he had been recruiting persons for his contract in Jeddah and the statement recorded from the witnesses showed how he come into possession of the 40,000US$ and therefore, the respondents had discharged their duty in proving the contravention. Even before the Board, the counsel for the appellant was asked whether it is possible for the appellant to produce the requisite evidence of encashment of the balance 40,000US$. He could not do it. It is not the possession of just 40,000US$, he had with him but 195 Singapore dollars also. So, the respondents have satisfactorily proved that gone to Singapore on 13-02-1981, he had not handedover the currency declaration form and that the seized foreign exchange was acquired by him from Hassan Bai and the candidates selected by him for jobs abroad. The mere production of the customs declaration form is not

adequate to dislodge the case of the department which they have satisfactorily proved.
31. It is contended that strict rules of evidence are not applicable to proceeding under the FERA. In fact that was the repeated submission on behalf of the respondent that rules of evidence and the safeguards given to the accused may not apply to these proceedings.
32. In this context, we refer to the following case, which was a case that arose out of proceedings similar to the proceedings under FERA. In Mohtesham Mohd. Ismail Vs. Spl. Director, Enforcement Directorate and Another (2007 (8) SCC 254) the Supreme Court held as follows:
"19. Apart therefrom the High Court was bound to take into consideration the factum of retraction of the confession by the appellant. It is now a well- settled principle of law that a confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of the conclusion deducible therefrom. [See Haricharan Kurmi etc. v. State of Bihar (AIR 1964 SC 1184); Haroom Haji Abdulla v. State of Maharashtra (AIR 1968 SC 832) and Prakash Kumar alias Prakash Bhutto etc. v. State of Gujarat (2007) 4 SCC 266.
20. We may, however, notice that recently in Francis Stanly @ Stalin v. Intelligence Officer, Narcotic Control Bureau, Thiruvanthapuram (2006 13 SCC 210) this Court has emphasized that confession only if found to be voluntary and free from pressure, can be accepted. A confession purported to have been made before an authority would require a closure scrutiny. It is furthermore now well-settled that the court must seek corroboration of the purported confession from independent sources.
21. In The Assistant Collector of Central Excise, Rajamundry v. Duncan Agro Industries Ltd. ((2000) 7 scc 53), this Court held:
"...The inculpatory statement made by any person under Section 108 is to non-police personnel and hence it has no tinge of inadmissibility in evidence if it was made when the person concerned was not then in police custody. Nonetheless the caution contained in law is that such a statement should be scrutinised by the court in the same manner as confession made by an accused person to any non-police personnel. The court has to be satisfied in such cases, that any inculpatory statement made by an accused person to a gazetted officer must also pass the tests prescribed in Section 24 of the Evidence Act. If such a statement is impaired by any of the vitiating premises enumerated in Section 24 that statement becomes useless in any criminal proceedings.""
33. In P.S. Barkathali Vs. Director of Enforcement, New Delhi, (CFC (Ker) 50) the Kerala High Court held,
"11. Section 24 of the Evidence Act states that a confession made by an accused person is irrelevant in a criminal proceeding if it appears to the Court that the confession was obtained under circumstances mentioned in the section. This section will also apply only to a confession made by a person who was at that time an accused person. On September 27, 1972, the appellant was not an accused person. Adjudication proceedings are not criminal proceedings, though they may be quasi-criminal in nature. Hence, the applicability of S.24 of the Evidence Act also has to be negatived.
12. Therefore, the principles governing the admissibility of a confession of an accused person and the manner in which a retracted confession is to be dealt with by a Court of law, cannot be applied to the instant case. The principle that a retracted confession, though it is not on par with the evidence of an accomplice or such other tainted evidence, requires some corroboration to satisfy the conscience of the court that the statement is true, will not apply to the statement recorded under the provisions of the Act.
13.However, this does not mean that such a statement can be freely relied on like any other piece of evidence in adjudication proceedings under the Act. It is true that whenever a statement is challenged as having been obtained by unfair and unlawful means, law cannot presume that it has been so obtained. It must be show to have been obtained by such unfair means and is not voluntary. In such a case, the contents of the statement can have no value. Even when, as a matter of fact, it is not shown that the statement is so vitiated, the authority, which is called upon to accept the statement as evidence, must bear in mind the possibility of such unfair means having been used and

approach this evidence with cause."
34. In Deputy Director Enforcement Directorate Vs. P. Mansoor Mohamed Ali Jinna (CFC (Mad) 301), in paragraph Nos. 19 and 23, it has been stated as follows:
"19. A Full Bench of this Court in Roshan Beevi vS. Joint Secretary to the Government, Tamil Nadu, Public Dept., 1984 Crl. L.J. 134 to which one of us, Ratnavel Pandian, J. (as he then was) was a party, while dealing with the question of prolonged custody of a person under the guise of enquiry, interrogation of investigation, held under section 107 or section 108 of the Customs act, has made the following observation :
"If, in given case, the Customs Official detains any person required or summoned under the provisions of the Customs Act for a prolonged period, even exceeding twenty-four hours, or keeps him in closed doors as a captive prisoner surrounded by officials or locks him in a room or confines him to an office premises he does so at his peril, because sections 107 and 108 of the Customs Act do not authorise the officer belonging to the Customs Department to detain a person for a prolonged custody and deprive him of the elementary facilities and privileges to which he is entitled. In such a situation, the officer must be held to have over-stepped his limits, and any confessional statement obtained from such a person by keeping him in a prolonged custody has to be regarded with grave suspicion, because there is always room for criticism that such a confession might have been obtained from extorted maltreatment or induced by improper means. As pointed out by the Supreme Court in Nathu vs. State of Uttar Pradesh AIR 1956 SC 56, the prolonged custody may stamp the confessional statement so obtained as involuntary one and the intrinsic value of such a statement may be vitiated."
Of course, this observation could be adopted in an enquiry made under the provisions of the FERA also.....
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The ratio of this decision is that though a Customs Officer may, in order to enable him to discharge his duties efficiently, be invested with some powers, which may have similarity with those of Police Officers yet since the primary purpose of investing of such powers in him is not for the purpose of maintaining law and order but for a specific purpose such as, safeguarding the revenues of the State or its economy, he will not fall within the expression "police officer" and the statement recorded by him would not be hit by Section 25 of the Evidence Act."
Therefore, the fact that these are adjudication proceedings does not mean that evidence and statements obtained by unfair and unlawful means can be accepted. The Court must be satisfied that it is reliable. Therefore, this Court cannot accept retracted statements made by the accused persons and convict them on the basis of such statements on the ground that the rigour of Criminal Procedure Code or the FERA Act may not be applied to these proceedings. We have satisfied ourselves that even though the appellant claims that he has retracted the statements, the receipt of which is denied by the respondent there are enough corroborating materials and documentary evidence to confirm the finding against the appellant.
35. In the result, the appeal is dismissed. However, there will be no order as to costs. The connected miscellaneous petitions are closed.

rpa/glp

To

Additional Directorate
Enforcement Directorate
New Delhi